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SUPREME COURT U S

No. 83-5908

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Billy Junior Allen,

Appellant

v.

State of Iowa,

Appellee

APPEAL FROM THE SUPREME COURT OF IOWA
JURISDICTIONAL STATEMENT

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Iowa Code Section 814.6

Pursuant to Rules 15 and 46 of the Rules of the Supreme Court of the United States, appellant Billy Junior Allen, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order entered by the Iowa Supreme Court in this case and should exercise such jurisdiction herein.

ORDER BELOW

The order of the Iowa Supreme Court, speaking through Chief Judge W.W. Reynoldson, is included herein as Appendix A (pp. 1-2).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from the Iowa Supreme Court dismissal, without reaching the merits, on November 7, 1983 of the appellant's appeal of a pretrial order denying his motion to dismiss his pending first-degree burglary charge on double jeopardy grounds. Appellant had previously sought discretionary review of the denial with the Iowa Supreme Court and said review was refused.

Appellant contends that the pretrial order denying his motion to dismiss is a final judgment and that the Iowa Supreme Court's dismissal of the appellant's appeal confers jurisdiction upon this Court to review the appellant's claim on its merits.

Further, the constitutionality of the Iowa Criminal appeals statute is challenged by the appellant. Iowa Code Section 814.6(1) states:

> 1. Right of appeal is granted from the defendant from:
> a. A final judgment of sentence, except in case of simple misdemeanor and ordinance violation convictions.
> b. An order for the commitment of the defendant for insanity or drug addiction. (Emphasis added)

Although the Iowa Supreme Court has not rejected the appellant's double jeopardy contention, it has refused to consider the matter on its merits until after sentence. Under the aforementioned statute, the appellant has no opportunity to obtain appellate review of his double jeopardy claim until after he

stands trial for a second time. To be twice tried is to be twice put in jeopardy in violation of the guarantees of the Fifth and Fourteenth Amendments to the United States Constitution.

A timely notice of appeal was filed on the 7th day of December, 1983, in the Supreme Court of Iowa, which is included herein as Appendix B.

Jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257, Subparagraph (2).

Cases that sustain the jurisdiction of this Court include:

Bullington v. Missouri, 451 U.S. 430 n.8, 101 S.Ct. 1852 n.8, 68 L. Ed. 2d 270 n.8 (1981)

Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L. Ed. 2d 651 (1977)

Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L. Ed. 2d 212 (1977)

QUESTIONS PRESENTED

1. Is the Iowa Criminal appeals statute, included herein as Appendix C (page 1), unconstitutional in that it postpones appellate review of double jeopardy claims until after conviction and sentence?

2. Does the Double Jeopardy Clause bar the successive prosecution of the appellant for first-degree burglary after the appellant's acquittal of first-degree felony-murder wherein the appellee chose robbery as the felony underlying the felony-murder charge, but factually, could have submitted first-degree burglary as the felony predicate?

3. Does a general verdict of acquittal of first-degree felony-murder bar the successive prosecution of the appellant for first-degree burglary when the first-degree burglary charge arose from the same facts and from the same incident as did the felony-murder charge?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in part that,

> " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ."

The Fourteenth Amendment to the Constitution of the United States provides in part,

> ". . . no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF CASE

The facts of the case underlying this appeal are as follows: The appellant is currently incarcerated in the Polk County Jail in Des Moines, Iowa awaiting trial for the crime of first-degree burglary said charge having been filed on December 2, 1982. Appellant had previously been charged on April 30, 1982 with first-degree felony-murder wherein the appellee alleged that the appellant had murdered Cliff Welling at the Welling residence. Appellant was acquitted of the first-degree felony-murder charge on November 9, 1982. Appellant's first-degree burglary charge arose from the same incident that led to the appellant's trial and acquittal on first-degree felony-murder.

On September 16, 1983 appellant filed a motion to dismiss the first-degree burglary charge contending his trial on that charge would violate the Fifth and Fourteenth Amendments of the United States Constitution by placing him twice in jeopardy for the same offense and further, that the appellee is barred and foreclosed from prosecuting the appellant because said prosecution would be collaterally estopped and precluded, as established in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L. Ed. 2d 469 (1970). The Iowa District Court in and for Polk County, reaching the merits of the appellant's double jeopardy and collateral estoppel contention, denied the motion on November 3, 1983, a copy of said order is included herein as Appendix D(pp. 1-28). Appellant then attempted to obtain review in the Iowa Supreme Court by first applying for discretionary review on November 3, 1983 pursuant to Iowa Code Section 814.6(2) which is included herein as Appendix E (page 1). On November 4, 1983, the Iowa Supreme Court denied

the application for discretionary review and on the same day appellant filed a notice of appeal pursuant to Iowa Code Section 814.6(1)(a) which is included herein as Appendix F (page 1). The Iowa Supreme Court, speaking through Chief Justice W.W. Reynoldson, on November 7, 1983 dismissed the notice of appeal without prejudice to the appellant's right to reassert the double jeopardy contention on direct appeal in the event of an adverse trial court judgment. (A copy of the dismissal is included herein as Appendix A).

Trial was scheduled to begin November 8, 1983. After receiving notice that the appeal was dismissed, the appellant during the late afternoon of November 7, 1983, filed in the United States District Court, Southern District of Iowa, Central Division:

a. A complaint alleging a violation of 42 U.S.C. Section 1983
b. An application for injunction to stay the impending state court trial.

Minutes before the appellant's trial was to commence, United States District Court Chief Judge W.C. Stuart granted the appellant a temporary stay of the state court trial to allow the appellant the opportunity to seek appellate review with the United States Supreme Court. (A copy of the stay and ruling supporting the stay are included herein as Appendices G (pp. 1-2) and H (pp. 1-9)).

SUBSTANTIALITY OF QUESTIONS

This appeal presents important and substantial questions, as hereafter described:

1. Pursuant to the Iowa Criminal appeals statute, appellate review of double jeopardy claims are postponed until after sentence, thus conflicting with the Fifth and Fourteenth Amendments of the United States Constitution protecting individuals from being twice tried for the same offense.

2. There has been no appellate review, on the merits, of the pretrial order denying the appellant's motion to dismiss wherein the appellant had contended that the pending criminal charge should be dismissed on double jeopardy grounds.

3. This Court has not previously been presented with the question of whether or not the Fifth and Fourteenth Amendments of the United States Constitution bar the successive prosecution of a defendant who has been acquitted of felony-murder, but is then charged with a felony which could have been, but was not submitted by the prosecution, as the felony-predicate to the felony-murder charge of which the defendant was previously acquitted.

4. The appellant in the instant case is being deprived of his liberty awaiting review in that he is indigent, cannot make bond, and is currently incarcerated in the Polk County Jail in Des Moines, Iowa.

CONCLUSION

For the reasons stated above, the appellant submits that this appeal brings before the Court substantial and important questions which require plenary consideration, with briefs and the merits and oral argument, for the resolution and that the Court should take jurisdiction of this appeal.

Dated this 7th day of December, 1983.

Respectfully submitted,

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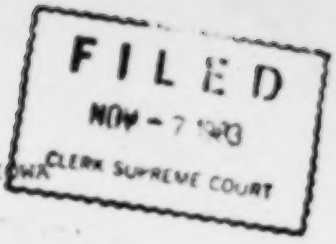
APPENDIX A



IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	No. 83-1432
Plaintiff-Appellee,	)	Polk County No. 21539
vs.	)	
BILLY JUNIOR ALLEN,	)	O R D E R
Defendant-Appellant.	)	

This matter is before the court upon the State's Motion to Dismiss the Appeal that has been filed by the defendant.

After hearing oral arguments, studying the motion filed and the memorandum brief filed by the defendant in support of the notice of appeal, the court finds that the Motion to Dismiss the Appeal should be sustained, subject to the right of the defendant to raise the same issues on direct appeal in the event of adverse judgment in district court.

It is therefore ORDERED that defendant's appeal filed on November 4, 1983, shall be and the same is hereby dismissed, all without prejudice to defendant's right to raise the same issues on direct appeal in the event of an adverse judgment in district court.

Done this 7th day of November, 1983.

Chief Justice - Supreme Court of Iowa

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APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 83-1432

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee

v.

BILLY JUNIOR ALLEN,

Appellant

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that, Billy Junior Allen, the appellant above-named, hereby appeals to the Supreme Court of the United States from the order of the Iowa Supreme Court, through Chief Justice W.W. Reynoldson, entered on November 7, 1983 dismissing without prejudice the appellant's appeal. Appellant had appealed as a matter of right a pretrial order denying his motion to dismiss his pending first-degree burglary charge on double jeopardy grounds.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, Subparagraph (2).

Dated this 7th day of December, 1983.

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Des Moines, IA 50309
Attorney for Appellant

APPENDIX C

IOWA CODE SECTION 814.6

814.6 The defendant as appellant or applicant.

1. Right of appeal is granted the defendant from:

a. A final judgment of sentence, except in case of simple misdemeanor and ordinance violation convictions.

b. An order for the commitment of the defendant for insanity or drug addiction.

2. Discretionary review may be available in the following cases:

a. An order supressing or admitting evidence.

b. An order granting or denying a motion for a change of venue.

c. An order denying probation.

d. Simple misdemeanor and ordinance violation convictions.

e. An order raising a question of law important to the judiciary and the profession.

APPENDIX D

IN THE DISTRICT COURT OF THE STATE OF IOWA

IN AND FOR POLK COUNTY

STATE OF IOWA, Plaintiff, vs. BILLY JUNIOR ALLEN, Defendant.	)	Criminal No. 21539 RULING

STATEMENT

Defendant's Motion to Dismiss filed on the 16th day of September, 1983 came on for hearing on the 28th day of September, 1983.

Assistant Polk County Attorney Ray Kinley appeared for the State.

Rick Olson appeared for the defendant. Defendant appeared.

Defendant presented evidence at the hearing. The State presented no evidence. The Court took the matter under advisement.

Defendant filed Brief in Support of Motion to Dismiss.

The State filed Resistance to Motion to Dismiss Trial Information and brief.

The Court has considered the evidence including the transcript (Defendant's Exhibit A) in the case entitled State of Iowa, Plaintiff -vs- Billy Junior Allen, Criminal No. 20081, read the briefs and resistance and reviewed the file both in this case and in State of Iowa, Plaintiff -vs- Billy Junior Allen, Criminal No. 20081 (State's Exhibit 1). The Court now makes and files the following.

THE ISSUES

Defendant raises five issues in his Motion to Dismiss:

1. The Court should dismiss the action for the State's failure to indict defendant with Burglary in the First Degree within 45 days after he was arrested. Division I of the

Motion raises this issue.

2. The Court should dismiss the action for the State's failure to try the present offense together with the murder prosecution. Speedy trial rule requires a dismissal since defendant was not indicted with Burglary in the First Degree within 45 days after he was arrested. Division II of the Motion raises this issue.

3. The Court should dismiss the action because:

   (a) it was filed for the sole purpose of harrassing the Defendant, was vindictive and was done to seek revenge for the Defendant's previous murder acquittal;

   (b) before this action was filed, the Polk County Attorney's Office had never filed a second charge arising out of the same set of facts against a Defendant who had been previously acquitted;

   (c) the filing of the instant charge is fundamentally unfair to the Defendant, in that the State is not attempting to correct a mistaken theory of prosecution as was permissible in the case of State v. Combs, 316 N.W.2d 880 (Iowa 1982).

   (d) the instant charge has been filed in bad faith.

   Division III of the Motion raises these matters.

4. The Court should dismiss the action because by the filing of the instant action, Defendant has been twice placed in jeopardy for the same offense in violation of the 5th and 14th Amendment to the United States Constitution and Article I, Section 12 of the Iowa Constitution and Section 816.1 of the Iowa Code. The instant charge should be considered an included offense of Felony Murder. The State chose to submit Robbery in the First Degree as the felony under the State's Felony Murder theory. Defendant has been previously acquitted of the crime of Felony Murder of Clifford Welling.

   Division IV of the Motion raises this issue.

5. The Court should dismiss the action because the State is barred and foreclosed from prosecuting said charge on the theory of collateral estoppel/ issue preclusion established in Ashe v. Sevenson, 397 U.S. 436, 90 S.Ct. 1189 and reaffirmed in Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096 (1972)

   Division V of the Motion raises this issue.

ISSUE NO. 1

The Court should dismiss the action for the State's failure to indict defendant with Burglary in the First Degree within 45 days after he was arrested.

A.

FINDINGS OF FACT

The Court finds the following facts on this issue:

1. The Trial Information in the instant case was filed December 2, 1982, charging the Defendant with the crime of Burglary in the First Degree, in that on or about the 5th day of March, 1982, the Defendant did commit burglary in the first degree upon the property of Clifford Welling and intentionally or recklessly inflicted physical injury upon Clifford Welling.

2. Defendant had been previously charged by Trial Information on April 30, 1982, with murder in the First Degree. The Trial Information alleged that Defendant did on the 5th day of March, 1982, commit or aid and abet in the commission of murder in the first degree, resulting in the death of Clifford Welling, a person. The trial court in the murder prosecution did not instruct on Burglary in the First Degree as a lesser included offense nor did the trial court submit Burglary in the First Degree as a felony under the State's felony murder theory.

3. Defendant was initially arrested in Ohio and was transported and held in the Polk County jail on the charge of Murder in the First Degree from April 22, 1982 to the date of his acquittal on November 9, 1982.

4. On December 7, 1982, the Court entered an order that a warrant issue for the arrest of Defendant because of the filing of the Trial Information for Burglary in the First Degree on December 2, 1982. Defendant was subsequently arrested.

B.

APPLICABLE LAW AND REASONING

Defendant without saying it is putting forth the argument of merger. He asserts that since the facts supported a request for

the Court to instruct the jury that the felony committed by the Defendant at the time of the death of the victim was Burglary in the First Degree, the 45 day time limit of R. Cr. P. 27(2)(a) commenced from the date of the original arrest for murder on April 22, 1982. R. Cr. P. 27(2)(a) provides in part, "When an adult is arrested for the commission of a public offense..., and an indictment is not found against him in 45 days, the court must order the prosecution to be dismissed..."

'Defendant's argument lacks merit. As Defendant concedes, the trial court in the murder prosecution did not submit Burglary in the First Degree under the State's theory of felony murder but submitted Robbery. Felony murder is simply a specific method set apart by the legislature by which the prosecution may show that defendant was acting with the evil state of mind which is necessary to support a finding of first degree murder. State v. Williams, 285 N.W.2d 248, 270 (Iowa 1979). Under these circumstances the underlying felony is not considered to be a lesser included offense. The jury makes no determination that the defendant was guilty or not guilty of the underlying felony - only that the killing was done in the perpetration of a forcible felony. Further support is found in Section 702.13, The Code defining participation in a public offense and Uniform Instruction (Criminal) 203 (Participating In A Public Offense - Definition). Section 702.13 does not require a finding that the underlying offense be successful. See State v. Mead, 318 N.W.2d 440, 446, 447 (Iowa 1982) where the court used the same reasoning in rejecting defendant's merger argument that where he was charged with kidnapping and assault while participating in a felony - Burglary, a conviction of assault while participating in burglary does not permit a conviction of burglary also.

Defendant does not argue in Division I that Burglary in the First Degree is a lesser included offense of Murder in the First Degree, triggering I. R. CR. P. 27(a)(2). See State v. Sunclades, 305 N.W.2d 491-494 (Iowa 1981) holding that the forty-five day period of R. Cr. P. 27(2)(a) applies only to the charge for which Defendant has been arrested and to any lesser-included offenses thereof and does not apply to distinct offenses. Nor could he

successfully because clearly the legal test is not met. State v. Webb, 313 N.W.2d 550, 552 (Iowa 1981) (A greater offense necessarily includes a lesser one if the lesser offense is composed solely of some but not all elements of the greater crime, and if it is impossible to commit the greater offense without committing the lesser.)

Thus, what the Court is left with is an offense distinct and separate from Murder in the First Degree. Under these circumstances, I. R. CR. P. 27(a)(2) was triggered, if triggered at all, when Defendant was arrested on the Burglary charge. Since the Trial Information on the Burglary charge was filed before Defendant was arrested for the charge, R. Cr. P. 27(2)(a) was never violated.

CONCLUSIONS OF LAW

The Court concludes the arrest of the Defendant on April 22, 1982, for the crime of Murder in the First Degree did not trigger R. Cr. P. 27(2)(a) with respect to the present charge of Burglary in the First Degree. R. Cr. P. 27(2)(a) was never violated as to the present charge since the Trial Information was filed before Defendant was arrested for the charge. Accordingly, Division I of the Motion to Dismiss should be overruled.

ISSUE NO. 2

The Court should dismiss the action for the State's failure to try the present offense together with the murder prosecution. Speedy trial rule requires a dismissal since defendant was not indicted with Burglary in the First Degree within 45 days after he was arrested.

A.

FINDINGS OF FACT

The Court incorporates herein its findings of fact under Issue No. 1

B.

APPLICABLE LAW AND REASONING

Defendant concedes State v. Eichorn, 325 N.W.2d 95 (Iowa 1982) ("Rule 6(1) permits but does not require that multiple offenses be tried together.") is dispositive of this issue but nevertheless he

requests the Court to change the law. The Court denies the request because it is not the function of the trial court to change or overrule existing law. State v. Eichler, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957). Accordingly, Division II of the Motion to Dismiss should be overruled.

ISSUE NO. 3

The Court should dismiss the action because:

(a) it was filed for the sole purpose of harassing the Defendant, was vindictive and was done to seek revenge for the Defendant's previous murder acquittal;

(b) before this action was filed, the Polk County Attorney's Office had never filed a second charge arising out of the same set of facts against a Defendant who had been previously acquitted;

(c) the filing of the instant charge is fundamentally unfair to the Defendant, in that the State is not attempting to correct a mistaken theory of prosecution as was permissible in the case of State v. Combs, 316 N.W. 2d 880 (Iowa 1982);

(d) the instant charge has been filed in bad faith.

A.

FINDINGS OF FACT

The Court incorporates herein its findings of fact under Issue No. 1 and finds the additional following findings of fact on Issue No. 3:

5. Ron Wheeler is the First Assistant Polk County Attorney. His duties include supervising the Criminal Bureau of the Polk County Attorney's Office.

6. Mr. Wheeler acts as a legal adviser to investigating officers and makes decisions on whether a charge should be filed.

7. County Attorney Dan Johnston and Wheeler reviewed the facts in State of Iowa vs. Billy Junior Allen, Cr. No. 20081 (the murder charge) after Defendant was acquitted. Together they made the decision to file the present Burglary charge.

8. During the last 5 years, Mr. Wheeler could not recall that a similar decision had been made in the County Attorney's Office.

9. Five reasons formed the basis of the decision to file the present charge. First, there was an acquittal in a substantial case. Second, the acquittal was contrary to the evidence as Johnston and Wheeler viewed it. Third, there was overwhelming evidence of guilt. Fourth, in their view there was no legal obstacle to filing the present charge. Fifth, Wheeler felt because the evidence of guilt was overwhelming, Defendant posed a threat to the community.

10. James Smith, the Assistant Polk County Attorney who prosecuted the murder charge against Defendant, did not participate in the decision to file the instant charge. Because of his involvement in the prosecution of the murder charge, Smith wished to avoid any appearance on his part that he was acting out of vindictiveness. However, Smith did not indicate to Wheeler or Johnston that the Burglary charge should not be filed.

11. Wheeler does not know Defendant nor does he know any members of his family.

12. Wheeler professed he was seeking no revenge and had no personal feelings against Defendant or his family.

B.

APPLICABLE LAW AND REASONING

Discretion as to what charge to prosecute is normally left to the authority charged with the duty to prosecute. State v. Iowa Dist. Court For Shelby County, 308 N.W.2d 27, 30 (Iowa 1981).

Selectivity in prosecution is not a per se constitutional violation. The constitution is not violated unless the selection is deliberately based on an unjustifiable standard, i.e., race, religion, or other arbitrary classification. State v. Walker, 236 N.W.2d 292, 295 (Iowa 1975); State v. Apt, 244 N.W.2d 801, 804 (Iowa 1976); State v. Durrell, 300 N.W.2d 134, 135, 136 (Iowa 1981); State v. Heck, 301 N.W.2d 741, 742 (Iowa 1981).

Preindictment delay in State v. Sunclades, 305 N.W.2d 491, 494, 495 (Iowa 1981) did not require a dismissal of charges where nothing indicated that the State's action in indicting defendant was vindictive and where defendant showed no prejudice. In Sunclades, defendant was arrested for the crime of attempt to commit murder on July 21, 1978 and was charged with said crime in a Trial Information on July 31, 1978. A jury found him guilty of the lesser included offense of assault with intent to inflict serious injury. On June 19, 1979, defendant was arrested for the offense of going armed with intent based on the same facts giving rise to the earlier charge. A Trial Information was filed on June 27, 1979. In rejecting defendant's contention the Court said at pages 494 and 495: "There is no constitutional right to be arrested and charged at the precise moment probable cause comes into existence. xxx Although the information charging defendant with going armed with intent and assault while participating in a felony was filed approximately eleven-and-one-half months after the shooting incident upon which the charges are based, there is nothing in the record to indicate that the State's purpose for filing those charges was to seek revenge for defendant's conviction of assault with intent to inflict serious injury, rather than the greater offense of attempted murder. Had defendant established that the preindictment delay was occasioned solely to avoid the possibility of concurrent sentencing, we would not condone such a late prosecution. We will not presume bad faith or impropriety on the part of the state, however. There is nothing in the record to indicate that the State's motive for indicting defendant on the present charges was vindictive. Nor has defendant shown that he was actually prejudiced in any other way."

Likewise, in the instant case, this Court will not presume bad faith or impropriety on the part of the State. All of the reasons given by Wheeler indicate a proper exercise of discretion to prosecute and do not reflect any purpose on the part of the State to seek revenge for Defendant's acquittal or to harass him. Nor does the record reflect such prosecution was vindictive.

Nor was the State's action fundamentally unfair to Defendant since the State had legitimate reasons to prosecute the present charge.

Nor has Defendant established any basis for a constitutional violation on the basis of selective prosecution. No evidence appears in this record that selection for prosecution was deliberately based on an unjustifiable standard, i.e., race, religion, or other arbitrary classification. Further, the filing of separate charges arising out of the same incident has been reviewed and approved by the Iowa Supreme Court. State v. Combs, 316 N.W.2d 880 (Iowa 1982).

CONCLUSIONS OF LAW

Defendant has failed to establish that the State's purpose in prosecuting the present charge was to harass Defendant, to seek revenge for Defendant's acquittal or was vindictive or done in bad faith. Defendant has also failed to establish that the prosecution of the present charge is fundamentally unfair to Defendant. Accordingly, Division III of the Motion to Dismiss should be overruled.

ISSUE NO. 4

The Court should dismiss the action because by the filing of the instant action, Defendant has been twice placed in jeopardy for the same offense in violation of the 5th and 14th Amendment to the United States Constitution and Article I, Section 12 of the Iowa Constitution and Section 816.1 of the Iowa Code. The instant charge should be considered an included offense of Felony Murder. The State chose to submit Robbery in the First Degree as the felony under the State's Felony Murder theory. Defendant has been previously acquitted of the crime of Felony Murder of Clifford Welling.

A.

FINDINGS OF FACT

The Court incorporates herein its findings of fact on Issue No. 1 and Issue No. 3.

B.

APPLICABLE LAW AND REASONING

The 5th Amendment to the United States Constitution provides in part, " xxx nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb xxx."

Article I Section 12 of the Iowa Constitution provides in part, "No person shall after acquittal be tried for the same offense.

Section 816.1, The Code of Iowa provides in part, "A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense xxx."

R. Cr. P. 6(1) provides in part, "Two or more public offenseswhich arose from the same transaction or occurrence xxx may be alleged and prosecuted as separate counts in a single xxx information xxx." R. Cr. P. 6(2) provides, "Upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an included offense, but not both."

The thrust of Defendant's argument is that Burglary in the First Degree could have been submitted by the State in the murder prosecution as the underlying felony for the State's theory of felony murder but the State chose to submit Robbery in the First Degree as the underlying felony. He concludes then that Burglary in the First Degree should be considered an included offense of Felony Murder and an acquittal of the murder prosecution bars the prosecution of the present charge of Burglary in the First Degree.

A similar argument was advanced in State v. Mead, 318 N.W.2d 440 (Iowa 1982). In that case, the State charged defendant in three counts: Second-degree kidnapping, first degree burglary, and assault while participating in a felony. He was convicted on all three charges. On appeal the second-degree kidnapping was reversed because the evidence was insufficient to establish confinement. The other two convictions were upheld.

On appeal defendant in Mead contended that convictions for assault while participating in burglary and for burglary unconstitutionally subjected him to double punishment for the same

offense. Rejecting this contention the Court said at page 447: "The principal decision on this question, regarding state convictions, is Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 221, 53 L.Ed.2d 187 (1977), which relied on Blackburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (federal convictions). See also Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). A recent decision involving federal convictions is Albunaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The gist of these decisions is that the double jeopardy clause prohibits prosecution for the lesser crime where the greater crime cannot be committed without committing the lesser one. Harris, 443 U.S. at 682, 97 S.Ct. at 2913, 52 L.Ed.2d at 1056 ('When as here, conviction of the greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one.') (In Harris, the state appellate court held that in a felony murder case, the proof of the underlying felony is needed to prove the intent necessary for a felony murder conviction. The State conceded that in a murder case, it was necessary for all the ingredients of the underlying felony of Robbery with Firearms to be proved.) Since we have held that conviction on the present assault charge is not dependent upon conviction on the burglary charge, no violation of the double jeopardy clause appears."

The analysis leading to this last statement in Mead is found at page 446: "For his second merger claim, defendant advances the novel proposition that a conviction of assault while participating in burglary does not permit a conviction of the burglary also. He arrives at that result by two routes. Defendant first contends that to be convicted of assault while participating in burglary, a person must be found to have committed burglary; therefore burglary is necessarily included in the assault. Defendant's problem is with his premise: that a person must be found to have committed burglary. Included offenses are ascertained by the familiar two-step test - legal and factual - xxx We need only

consider the legal step. Under that step, the question is whether the greater offense cannot be committed without committing the lesser offense. xxx The question is whether the State had to prove, on the charge of assault while participating in burglary, that defendant actually committed the burglary in order to be participating in it. The answer is controlled by section 702.13 of The Code. 'A person is participating in a public offense, during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be. A person is participating in a public offense during this period whether the person is successful or unsuccessful in committing the offense. (Emphasis added.) We applied that section, in a sexual abuse context, in State v. Johnson, 291 N.W.2d 6, 8 (Iowa 1980). Under the section, a person may participate in an offense although he does not commit it. The result is that assault while participating in burglary can be committed without committing the burglary, hence the burglary is not necessarily included in the assault. Consequently burglary is not merged into assault while participating in burglary."

The same analysis can be made in this case. As pointed out previously, Burglary in the First Degree under the legal test is not a lesser included crime of Murder in the First Degree and Murder in the First Degree, can be committed without committing the lesser offense of Burglary in the First Degree.

Even had the State chosen to use Burglary in the First Degree as the underlying felony under its Felony Murder theory, merger would not apply. Section 707.2, The Code of Iowa, provides in part, "A person commits murder in the first degree when he or she commits murder under any of the following circumstances: xxx 2. The person kills an another person while participating in a forcible felony." Utilizing the foregoing analysis in Mead, the Court concludes the State did not have to prove defendant actually

committed the forcible felony, Burglary in the First Degree, in order to be participating in it because of Section 702.13, The Code (defining participating in a public offense). The result is that Murder in the First Degree under the theory of Felony Murder with Burglary in the First Degree as the underlying felony can be committed without committing the burglary. Hence, under these circumstances Burglary in the First Degree would not be merged into Murder in the First Degree. And finally, as pointed out in Mead, since conviction of Murder in the First Degree on the theory of Felony Murder utilizing Burglary in the First Degree as the underlying felony is not dependent upon the conviction of Burglary in the First Degree, no violation of the Double Jeopardy Clause State or Federal appears.

C.

CONCLUSION OF LAW

No violation of double jeopary, Federal or State, occurs in the prosecution of the present charge even though the State in the first degree murder prosecution could have used Burglary in the First Degree as the underlying felony under its theory of felony murder. Accordingly, Division IV of the Motion to Dismiss should be overruled.

ISSUE NO. 5

The Court should dismiss the action because the State is barred and foreclosed from prosecuting said charge on the theory of collateral estoppel/issue preclusion established in Ashe v. Sevenson, 397 U.S. 436, 90 S.Ct. 1189 and reaffirmed in Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096 (1972).

A.

FINDINGS OF FACT

The Court incorporates herein its findings of fact under Issue No. 1 and Issue No. 3 and finds the additional findings of fact on Issue No. 5:

13. In the murder prosecution, the accomplice, Daniel Reimers gave the following pertinent testimony:

> "Reimers at the time of trial had known Defendant for almost two years. He was, at the time of the incident, also acquainted with the Defendant's brother, Jimmy Allen.
>
> Billy and Jimmy Allen were involved in the death of Clifford Welling, the victim about a week prior to March 5, 1982, the date of the incident. Reimers had conversation with the Defendant about the victim in which they agreed to break into the victim's home. The agreed upon date was March 5, 1982.
>
> On March 5, 1982, Reimers talked with Jimmy Allen about the break-in. Both proceeded by bus to S.E. 14th and Park. They called Defendant by phone from Woolco, a nearby shopping center. Ted Thompson, a friend of Defendant picked the two up and took them to the Defendant.
>
> The three planned to wait until the victim arrived home. The idea of the break-in was Defendant's. His lady friend (Sally Galageous) had told Defendant about the large amounts of money the victim displayed at the bar where she was working.
>
> The three, Reimers, Defendant and his brother left about 7:00 P.M. on foot to the victim's residence at 5211 S.E. 14th. Reimers saw someone in the home. The three waited about 45 minutes. Jimmy Allen went to the door with the idea of gaining entrance by telling the victim about a wreck and the need to use the phone. The ruse worked. The victim allowed Jimmy Allen entrance. While inside, Jimmy Allen made the phone call. When Jimmy started out of the residence, the other two rushed in.
>
> All three accosted the victim. The Defendant and Reimers had gloves on but Jimmy did not. The victim gave Defendant his wallet. At this point, Reimers went upstairs and started ransacking the victim's bedroom. While there, he found a hand gun in the left side of the bed. He put the gun in his pocket and left its holster hanging.
>
> Eventually, Defendant came upstairs with a knife in his hand and said he had to kill the victim. At this point the two went back downstairs. The victim was still alive exclaiming "My God, you done killed me." They heard the sirens from the ambulance that Jimmy had called. They ransacked the downstairs area and then left.
>
> Once outside, Defendant told Jimmy to go back and wipe off the phone which he did. Once this was done the three left. Their route took them through fields until they

reached McKinley Avenue. They had been running in single file through the fields. Four or five inches of snow were on the ground. When they got to McKinley they cut across that street through a backyard. Behind the yard was a creek. They followed the stream until they got to a little bridge. From there they went to Woolco where they called a cab.

They waited for the cab 15 to 20 minutes. The cab took the three to Reimer's mother's home at 1314 Fourth Street. In the cab the three talked about coming from a party.

At 1314 Fourth Street, they split up the victim's money. Eventually the three split up with Jimmy returning to where he was staying. Defendant and Reimers stayed the night at the latter's mother's home.

A week later, Defendant and Reimers sold the victim's gun to De Otis Coleman. Defendant carried out the transaction. The two left for Ohio where they were arrested.

Reimers was allowed to plead guilty to Burglary in the First Degree although he was initially charged with Murder in the First Degree.

14. Thelma Richmond gave the following pertinent testimony in the murder prosecution:

She lives at 1514 East McKinley and has for the past 43 years. On March 5, 1982, during the course of the evening she heard a lot of sirens on 14th and McKinley. She looked out and saw a rescue squad turn on 14th and McKinley. It was driving very slow. Seemingly the driver was looking for something.

At about this time she saw through her window two people cross her yard, another was in the street. All three then went down in by the creek.

She called the police about the three. She asked the dispatcher if there was any kind of a problem around 14th and McKinley and was told there was a personal injury. The tape recording of the call confirmed she had told the dispatcher she saw three fellas go running through a vacant lot beside her home and go across McKinley and go down the creek bed. Her home is in close proximity to the victim's home and was in the path Reimers claimed the three took after the break-in. The Woolco store is almost straight north of her home.

15. Paula Parrish gave the following pertinent testimony in the murder prosecution:

> On March 5, 1982 she was a dispatcher for C-Med Dispatch Counsel. Her work entailed receiving emergency phone calls for ambulance personnel and routing the calls to the proper authorities.
>
> About 8:30 P.M. on March 5, 1982, she received a call while on duty that there had been an accident at S.E. 14th and McKinley and they needed an ambulance. The call back number was 285-4022. She called fire rescue about the call and then called the police. The rescue went out to S.E. 14th and McKinley and was unable to find an accident. She called the call back number and received no answer.

16. Ricki Welch gave the following pertinent testimony in the murder prosecution:

> On March 5, 1982 he was driving a cab for Capital Cab Company. About 8:30 or 9:00 P.M. he drove to Woolco store on S.E. 14th. He was dispatched to that area. At that address he picked up three individuals. The trip sheet showed the call was taken at 9:10 P.M. The trip ended at 1322 Fifth Street. He was able to identify two of the three individuals from police photos - one was the Defendant. The conversation of the three in the cab was about a party.

17. William Melvin gave the following pertinent testimony in the murder prosecution:

> He has been employed by Capital Cab Company in Des Moines for two years. His duties included keeping records concerning various calls and trips by the company's cabs. His records show that on March 5, 1982, his company received a call at 9:10 P.M. to go to Woolco Store on S.E. 14th. The passenger's name was Allen.

13. DeOtis Coleman gave the following pertinent testimony in the murder prosecution:

> He lives at 1330 11th Street in Des Moines. During the month of March 1982, he purchased a .38 special from Defendant. He identified Exhibit 1 (previously identified as the victim's gun) as the one Defendant sold him.

19. Dr. Emanuel Lacsina, Polk County deputy chief medical examiner gave the following pertinent testimony in the murder prosecution:

> The victim had six stab wounds. The cause of death was multiple stab wounds.

20. George Lathum gave the following pertinent testimony in the murder prosecution:

> He knows Defendant. He knew the victim. During the latter part of February, 1982, Defendant and Lathum drove by the victim's residence. Defendant said he and a couple of his buddies were going to rob the victim.

21. Sally Galageous gave the following pertinent testimony in the murder prosecution:

> She knew the victim as a customer in a tavern where she was employed. She saw him carry large sums of money. She knew where he lived. On March 5, 1982 she lived at 3115 S.E. 17th in a condominium. Defendant was staying with her at this time. Reimers, Jimmy Allen and the Defendant were at her residence on the evening of March 5, 1982. The three left at about 7:00 P.M. She next saw Defendant three or four days later.

22. Craig Olson gave the following pertinent testimony in the murder prosecution:

> During the evening of March 5, 1982 he was at the residence of Sally Galageous. When he got there about 7:00 P.M., Defendant and Jimmy Allen were just leaving. Defendant told him he killed the victim by stabbing him five or six times. Defendant told Olson how he, Reimers and his brother got into the victim's home. Jimmy Allen knocked on the door and said there was a car accident and he would like to use the phone. The victim let Jimmy in. When the victim was letting him out, Defendant and Reimers ran in. Defendant showed the witness the .38 caliber gun they got from the victim.

23. John Kilgore, an Identification Technician for the Des Moines Police Department gave the following pertinent testimony in the murder prosecution:

> He compared latent fingerprints from the telephone with known fingerprints of Jimmy Allen. They matched.

24. Bruce Scott gave the following pertinent testimony in the murder prosecution:

> He is employed by the DCI in the laboratory section. He has had training in footwear identification. He compared photos of footprints taken at the scene with the shoes taken from Reimers and Jimmy Allen. He found the tread pattern on the bottom of the shoes to be similar to the photos of the footwear impressions taken at the scene.

25. Timothy Patrick Olson, M.D., testifying for the Defendant gave the following pertinent testimony in the murder prosecution:

> As staff psychiatrist at Broadlawns Medical Center he examined Defendant. He interviewed Defendant for evaluation on August 3, 1982 at which time Defendant told him he was not present at the time of the murder but was at a drugstore.

26. Ronald Ratigen testifying for the Defendant gave the following pertinent testimony in the murder prosecution:

> He first met Defendant on the date of his testimony. Reimers was Ratigen's cellmate in the Polk County Jail in the last part of April or first part of May, 1982. Reimers told Ratigen that he panicked and killed the victim. (Reimers denied telling Ratigen this in his testimony).

27. Chet Welling, brother of the victim, gave the following pertinent testimony on behalf of the State in the murder prosecution:

> The victim resided at 5211 S.E. 14th in Des Moines. He found his brother's body on March 6, 1982 about 10:00 A.M. The phone number at 5211 S.E. 14th was 285-4022. The business number there was 285-9696. He found the victim's home ransacked. The phone was jerked out. The body was found on the first floor. The victim kept a .38 Smith & Wesson in the headboard of his bed. The victim's billfold was missing and his credit cards.

28. Florence Knutson testifying on behalf of the State gave the following pertinent testimony in the murder prosecution:

> She and her husband did housework for the victim, the last time being March 5, 1982 in the morning. That morning she cleaned the upstairs bedroom where the victim slept. The victim kept a small hand gun in the left-hand side of the bed in a compartment in the headboard. It was there on March 5, 1982 when she cleaned.

29. Donald Nord testifying on behalf of the State gave the following pertinent testimony in the murder prosecution:

> He was a friend of the victim and had called him at his residence on March 5, 1982 at about 8:00 P.M. The phone conversation lasted about a half hour.

30. Gary Aubrey testifying on behalf of the State gave the following pertinent testimony in the murder prosecution:

> He phoned the victim's residence on Friday evening March 5, 1982 at about twenty till ten. The phone rang and there was no answer.

31. Jerry Jones, Des Moines Police Detective, testifying on behalf of the State gave the following pertinent testimony in the murder prosecution:

> Subsequent to March 5, 1982, he came in contact with the Defendant in Ohio. After advising him of his constitutional rights, Defendant denied he had ever been at the victim's residence.

32. John Shaver, Des Moines Police Detective, testifying on behalf of the State gave the following pertinent testimony i. the murder prosecution:

> His investigation of this incident was on the morning of March 6, 1982. He and Detective Jones followed footprints from the victim's property in a north-northeasterly direction over onto McKinley, and then across McKinley down along a little creek, and then across the footbridge and north where they lost the tracks where the snow had been plowed on the road. He saw two sets of prints. The tracks were traced across the corner of Mrs. Richmond's property, across to the driveway and right straight across the street to Yaeder Creek that runs down just north of the 1400 or 1500 block of McKinley.
>
> Shaver secured the tape of the phone call on March 5, 1982 about an apparent accident. The caller left a phone number for the victim's residence.

33. The trial court submitted Murder in the First Degree. No aiding and abetting instruction was given. The case was tried and instructed on the theory that the Defendant was the one who actually stabbed and killed the victim. The trial court gave an instruction concerning the State's theory of felony-murder as to the charge of Murder in the First Degree. The underlying felony under this theory in the instruction was Robbery. The elements of this instruction as given were:"I.(a) That on or about March 5, 1982, this Defendant unlawfully stabbed Clifford Welling. (b) That the stabbing of Clifford Welling was done willfully, deliberately,

with premeditation and with a specific intent to kill Clifford Welling. (c) That Clifford Welling died as a result of being stabbed. (d) That said stabbing was done with malice aforethought. II (a) That on or about March 5, 1982, this Defendant knowingly participated in the offense of Robbery. (b) That during the commission of the Robbery and incident to said Robbery the Defendant did unlawfully stab Clifford Welling.

34. During deliberations, the Court received the following message from the jury during its deliberation in the murder prosecution:

> We are somewhat confused regarding Instruction No. 17 (regarding proof that defendant was participating in the offense of Robbery). Is this saying that said defendant can be convicted of 1st degree murder without actually proving that he did the stabbing? In other words, is it necessary only to prove,
>
> 1. That defendant intended to commit a theft,
>
> 2. That defendant intended to assault (jump, beat).

The Court's response was:

> The answer to your question is no. Re-read instructions 16 (Marshalling Instruction on Murder in the First Degree) and 17.

35. The Court received another communication from the jury during its deliberation:

> There are a couple of people who want this confirmed ...
>
> Must we unanimously agree on NOT GUILTY of 1st degree murder before we can proceed to a lesser charge?

The Court's response was:

> As you have already been instructed in Instruction No. 36, "The verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agrees thereto. Your verdict must be unanimous.

B.

APPLICABLE LAW AND REASONING

The thrust of Defendant's contention is set out at page four of his motion:

> "3. At the Defendant's murder trial, counsel for the Defendant argued that his client was not present at the time of the murder of Clifford Welling.
>
> 4. No aiding and abetting instruction was given.
>
> 5. The only logical conclusion in interpreting the jury's acquittal of the Defendant, is that they believed that the Defendant was not present at the scene of the murder of Welling or, if he was present, he did not participate in the robbery, assault, or stabbing of Clifford Welling.
>
> 6. If the Defendant was not present at the murder scene, he obviously was not present at the Burglary scene since both places are one in the same.
>
> 7. If the Defendant was present at the murder scene, but didn't participate in the robbery, assault or stabbing of Clifford Welling, the elements of Burglary in the First Degree cannot be satisfied.

Defendant places reliance on two U.S. Supreme Court cases: Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) and Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972).

The Court in Ashe held that where three or four armed men robbed six poker players in the home of one of the victims and defendant was charged in separate counts with robbery of each of the six poker players and was tried on one count and was acquitted for insufficient evidence in the prosecution in which the identity of the defendant was the single rationally conceivable issue in dispute, the federal rule of collateral estoppel, embodied in the Fifth Amendment guarantee against double jeopardy, precluded subsequent prosecution of defendant for robbery of a different player.

In Ashe the Court defined collateral estoppel as simply meaning "that when an issue of ultimate fact has once been determined

by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 90 S.Ct. 1189, 1194.

In describing the approach in applying the principle, the Court said at page 1194: "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires the court 'to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'"

The Court went on to apply the rule to the facts it had before it: "Straight forward application of the federal rule to the present case can lead to but one conclusion. For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not."

Turner reaffirmed the rule in Ashe. The holding was that where in an Arkansas murder prosecution the trial court instructed on criminal responsibility of an accessory and the jury was instructed that it must find defendant guilty of first-degree murder if it found that he had killed decedent either with premeditation or unintentionally during the course of a robbery, the only logical conclusion from the general verdict of acquittal was that the jury found that the defendant was not present at the scene of the robbery and murder, even if the murder had actually been committed by the alleged accomplice in the robbery; thus, subsequent prosecution for robbery was foreclosed as the State was collaterally estopped from relitigating the issue whether petitioner had been present at the scene.

The Court's reasoning in Turner is found at 92 S.Ct. 2098, 2099: "In the present case, petitioner was not charged with robbery at the first trial, but the State has stipulated that the robbery and murder arose out of 'the same set of facts, circumstances, and the same occasion.' The crucial question, therefore, is what issues a general verdict of acquittal at the murder trial resolved. The jury was instructed that it must find petitioner guilty of first-degree murder if it found that he had killed the decedent Yates either with premeditation or unintentionally during the course of a robbery. The jury's verdict thus necessarily means that it found petitioner not guilty of the killing. The State's theory, however, is that the jury might have believed that petitioner and Richard Turner robbed Yates, but that Richard actually committed the murder. this theory is belied by the actual instructions given the jury. (These instructions reflect Ark. Stat. Ann. §41-2227 which makes accessories before the fact to first-degree murder subject to the same punishment as principals. Ark. Stat. Ann. §41-118 abolished the distinction between principals and accessories before the fact and also provides that "all accessories before the fact shall be deemed principals and punished as such." Ark. Stat. Ann. §41-119 defines an accessory as "he who stands by, aids, abets, or assists... the perpetration of that crime.") The trial judge charged that: 'An accessory is one who stands by, aids, abets, or assists... the perpetration of the crime. xxx All persons being present, aiding and abetting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted or informed against, and punished as such.' (Court's Instruction No. 13) Had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger. The only logical conclusion is that the jury found him not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates. This case is then squarely controlled by Ashe v. Swenson, supra, and must be reversed."

Two Iowa cases since Ashe and Turner have considered the collateral estoppel doctrine in the context of a double jeopardy claim, State v. Stergion, 248 N.W.2d 911, 913 (Iowa 1976) and State v. Sunclades, 305 N.W.2d 491, 495 (Iowa 1981).

In Stergion, defendant filed a motion to dismiss an OMVUI offense asserting he had previously been acquitted on three counts of manslaughter. Double jeopardy formed the basis of his motion. Defendant contended the death of three persons as a result of the accident was clear. Thus, the prior acquittal had to mean the jury found defendant was neither operating his vehicle recklessly nor was under the influence and as a consequence the State should not be permitted to litigate the intoxication issue. Accepting the proposition that collateral estoppel applies to criminal cases in Iowa, the Court rejected defendant's assertions saying at page 913: "This principle (collateral estoppel), however, only applies to questions of fact essential to the prior judgment, that is, only to ultimate facts. xxx The burden imposed on trial court is to hypothesize what it considers to be a 'rational' jury. The Court must then scrutinize those portions of the record itemized in Ashe, supra, (record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters) to arrive at the imaginary jury's collective and unanimous judgment on a crucial issue involved in the verdict. Under the record in thi case, trial court was not required to engage in this figmentary reconstruction. Defendant never offered the 'pleadings, evidence or charges' in the manslaughter trial for the court's examination. He merely appended to his dismissal motion several of the jury instructions from the prior proceeding. xxx The burden is on defendant to make an adequate record to show the verdict in the prior case necessarily foreclosed an issue to the subsequent proceeding. xxx These instructions (in manslaughter case) did not require the manslaughter jury merely to find three persons met death in a two-car collision. For a conviction, the jury had to find the deaths 'xxxwere not the result of a mere accident, but were the result of defendant's operating a motor vehicle while under the

influence of an alcoholic beverage or defendant's reckless driving.' Another instruction permitted the jury to convict only upon finding the deaths 'were the natural and proximate result' of defendant's recklessness or of his operation of a vehicle under the influence of an alcoholic beverage. When defendant's motion to dismiss was overruled, there was nothing before trial court to indicate the prior acquittal verdict was not barred on State's failure to prove the deaths were occasioned by defendant's conduct. In the OMVUI case, the evidence of defendant's intoxication was overwhelming. Evidence on proximate cause of the accident reflected a murky picture. The testimony tended to show this was an intersection collision with the right of way in doubt, and possible involvement of a third vehicle. Speculation about the basis for the manslaughter acquittal would have been inappropriate in ruling upon the dismissal motion. When the issue was raised again on motion for new trial, conjecture would have been even more hazardous."

In Sunclades, defendant was charged with attempt to commit murder and was found guilty of the lesser-included offense of assault with intent to inflict serious injury. Later he was charged upon facts arising out of the same incident with assault while participating in a felony and going armed with intent. He maintained that his prosecution for the offenses of going armed with intent and assault while participating in a felony was foreclosed by the principle of collateral estoppel/issue preclusion established in Ashe.

The Court in Sunclades stated the following conditions must be present for the doctrine to exist: (1) the issue decided in the prior trial must be precisely the same issue presented in the pending action; (2) a decision on that issue must have been necessary for the judgment on the prior trial; and (3) the party to be estopped from relitigating the issue must have been a party in the prior trial. P. 495. A further limitation that the collateral estoppel applies to ultimate facts, not to eventiary facts was also recognized. P. 496. Utilizing the legal test for lesser included crimes the court found that neither of the essential elements

of attempt to commit murder were present in the offenses of going armed with intent or assault while participating in a felony. Thus, the Court concluded, there was no issue of ultimate fact in the pending proceeding precisely identical to any of the issues decided in favor of defendant in the prior trial by virtue of his acquittal of attempt to commit murder.

The Court now has the burden to hypothesize what it considers to be a "rational" jury in the murder prosecution and review the portions of the record itemized in Ashe to arrive at the imaginary jury's collective and unanimous judgment on a crucial issue involved in the verdict.

As stated in Turner, at p. 2098, the crucial question is what issues a general verdict of acquittal at the murder trial resolved. The record of the murder trial leaves no question that the victim was stabbed and died as a result and that he was robbed. The remaining question is who did it.

In the murder case the jury was instructed that it must find defendant guilty of first-degree murder if it found, "I. (a) That on or about March 5, 1982, this Defendant unlawfully stabbed Clifford Welling. (b) That the stabbing of Clifford Welling was done willfully, deliberately, with premeditation and with a specific intent to kill Clifford Welling. (c) That Clifford Welling died as a result of being stabbed. (d) That said stabbing was done with malice aforethought.

II. (a) That on or about March 5, 1982, this Defendant knowingly participated in the offense of Robbery. (b) That during the commission of the Robbery and incident to said Robbery the Defendant did unlawfully stab Clifford Welling." The jury's verdict thus necessarily means that it found Defendant not guilty of the killing. It does not mean the jury necessarily found Defendant was not present at the scene as in Turner. This is because the trial court did not give an instruction on aiding and abetting as was given in Turner. The portions of the record stated in this Court's findings of fact show clearly that this case was tried and submitted on the

theory that the Defendant alone killed the victim. Under these circumstances a rational jury would not have been obligated to return a verdict of guilty even if it believed defendant was present at the scene. Absent the aiding and abetting instruction, there is no one and only logical conclusion as in Turner, that the jury found Defendant was not at the scene.

Further, as shown by this Court's findings of fact, there is overwhelming evidence in the record of the murder prosecution that this Defendant was present at the scene. A reasonable explanation for the verdict is that the jury believed Defendant was present but either Jimmy Allen or Reimers stabbed the victim. The jury might have disbelieved Reimers' denial and believed Ratigen's claim that Reimers told him he killed the victim.

This Court would have to indulge in speculation to reach the conclusion under the record on the murder case that the jury found defendant was not present. Speculation is not sufficient nor appropriate in arriving at what the "imaginary jury's collective and unanimous judgment on a crucial issue (whether defendant was present) involved in the verdict." Stergion, p. 914.

The Court must now deal with Defendant's remaining contention that if Defendant was present at the murder scene but didn't participate in the Robbery, assault or stabbing of Clifford Welling, the elements of Burglary in the First Degree cannot be satisfied. Defendant's contention assumes too much. Utilizing the same reasoning on the issue of Defendant's presence at the scene, the Court concludes the only possible conclusion from the verdict of acquittal is that a rational jury found Defendant did not stab and kill the victim and nothing more. Again, the Court would be indulging in speculation if it concluded from the acquittal that a rational jury found Defendant did not rob the victim, or assault him in a manner different than the stabbing. From the record a rational jury could find that all three assaulted the victim and inflicted injury upon him before the stabbing. The jury could find that from Reimer's testimony. A finding that Defendant did not stab and kill the victim does not foreclose the former assault.

Turning to the ultimate issue test in Sunclades (pp. 495-496), the Court concludes there is no issue of ultimate fact in Burglary in the First Degree as charged precisely identical to any issues decided in favor of Defendant in the prior trial by virtue of his acquittal of the charge of Murder in the First Degree. The essential elements of Breaking and Entering in the First Degree as charged are: (1) Breaking or entering; (2) no right, license or privilege to break or enter; (3) intent to commit a felony; (4) intentionally inflicting physical injury on the victim. None of these elements, with the possible exception of the last one, is present in Murder in the First Degree. As to the last element, the Court has already concluded that the verdict of acquittal does not necessarily foreclose a finding by a rational jury that Defendant did commit an assault other than the stabbing on the victim resulting in physical injury. Only the stabbing and resulting death are ruled out or foreclosed by the acquittal verdict.

CONCLUSIONS OF LAW

The verdict of acquittal in the murder prosecution does not collaterally estop or preclude the State from prosecuting the instant charge of Breaking and Entering in the First Degree against the Defendant. Accordingly, Division V of the Motion to Dismiss should be overruled.

ORDER

IT IS THEREFORE THE ORDER OF THE COURT that Defendant's Motion to Dismiss filed September 16, 1983 is hereby OVERRULED in its entirety.

Dated this 3rd day of November, 1983.

Louis A. Lavorato
JUDGE OF THE FIFTH JUDICIAL DISTRICT OF IOWA

Copies to:

Ray Kinley
Assistant County Attorney

Rick Olson
Attorney for Defendant

APPENDIX E

FILED
NOV - 4 1983
CLERK SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	Supreme Court Number 83-1426
Plaintiff,	)	Polk County No. 21539
vs.	)	
BILLY JUNIOR ALLEN,	)	O R D E R
Defendant.	)	

Defendant's Application for Discretionary Review; and his application to stay the trial scheduled for November 7, 1983, have been orally argued and submitted. The court finds that both applications should be denied.

It is therefore ORDERED that defendant's Application for Discretionary Review, and for stay, shall be and are hereby denied.

Done this 4th day of November, 1983.

Chief Justice - Supreme Court of Iowa

Copies to:

Rick L. Olson, Lawyer
1000 Carriers Building
601 Locust Street
Des Moines, IA 50309

Raymond J. Kinley
Assistant Polk County Attorney
Room 311, Polk County Courthouse
Des Moines, IA 50309

Honorable Louis A. Lavorato
Judge, Fifth Judicial District
Polk County Courthouse
Des Moines, IA 50309

Clerk of Court
Polk County Courthouse
Des Moines, IA 50309

Attorney General's Office
Att: Criminal Appeals Division
Hoover State Office Building
L O C A L

APPENDIX F

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA,

Plaintiff-Appellee

1983 NOV -4 PM 4:22

CRIMINAL NO. 21539

vs.

BILLY JUNIOR ALLEN,

NOTICE OF APPEAL

Defendant-Appellant

FILED

NOV - 7 1983

TO: Dan L. Johnston, Polk County Attorney
Polk County Courthouse
Des Moines, IA 50309

Clark Rasmussen, Clerk of the Court
Polk County Courthouse
Des Moines, IA 50309

YOU ARE HEREBY NOTIFIED that the Defendant herein has appealed to the Supreme Court of Iowa, from the November 3, 1983 ruling of The Honorable Louis A. Lavorato overruling the Defendant's Motion to Dismiss the instant charge which was filed on September 16, 1983.

Dated this 4th day of November, 1983.

Respectfully submitted,

Rick L. Olson
1000 Carriers Building
Sixth and Locust
Des Moines, IA 50309
Telephone: 515-243-1979

ATTORNEY FOR DEFENDANT-APPELLANT

The undersigned hereby accepts service of the Notice of Appeal in the above-entitled action and acknowledges receipt of a copy of the Notice of Appeal.

Dated this 4th day of November, 1983.

Assistant Polk County Attorney

APPENDIX G

FILED
NOV 0 1983
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BILLY JUNIOR ALLEN, Plaintiff	)	Civil No. 83-611-A
vs.	)	
DAN JOHNSTON and THE STATE OF IOWA, Defendants.	)	ORDER STAYING PROCEEDINGS

The above named plaintiff is scheduled to go on trial on the charge of burglary in the first degree in the District Court of Iowa in and for Polk County this morning. On September 16, 1983, plaintiff filed a Motion to Dismiss, alleging that he was being subjected to double jeopardy. That motion was denied November 3, 1983. Plaintiff sought discretionary review by the Iowa Supreme Court, which was denied. His Notice of Appeal to the Iowa Supreme Court as a matter of right was dismissed. Plaintiff claims that he now has a right of direct appeal to the Supreme Court of the United States.

This action under the Civil Rights Act, 42 U.S.C. § 1983 was filed late in the afternoon of November 7, 1983. This Court has jurisdiction under 28 U.S.C. § 1343. Plaintiff seeks a stay of the State criminal trial. Younger v. Harris 401 U. S. 37, forbids Federal Courts from enjoining pending State proceedings except in special circumstances. Although the Court is very hesitant to interfere in State Court proceedings, the Court believes that this situation presents such special circumstances.

The United States Constitution guarantees that a person will not be twice put to trial for the same offense. This plaintiff's Constitutional right would be violated when the trial starts, if his double jeopardy claim is meritorious to his irreparable injury.[1] At the present time he has not had the opportunity for appellate review of the issue on the merits. If plaintiff is entitled to a direct appeal to the United States Supreme Court, as claimed, the matter can be most expeditiously determined in that manner.

In the interest of justice, it appears to the Court that it should exercise its equitable powers to issue a limited stay of the trial in the State Court and further proceedings in this Court until plaintiff has had an opportunity to pursue an appeal to the United States Supreme Court and seek a further stay of State Court proceedings from that Court.

IT IS THEREFORE ORDERED that the trial of Billy Junior Allen in the District Court of Iowa in and for Polk County should be and it is hereby stayed for a period of thirty days from the date of the filing of this order.

A written opinion supporting this order will be filed in the near future.

IT IS FURTHER ORDERED that proceedings in this Court will also be stayed until further order of the Court.

Signed this 8 day of November, 1983.

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

[1] Abney v. United States, 431 U.S. 651 (1977).

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
NOV 10 1983
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Billy Junior Allen, Plaintiff,	)	Civil No. 83-611-A
v.	)	RULING SUPPORTING ORDER GRANTING TEMPORARY STAY
Dan Johnston and State of Iowa, Defendants.	)	

The Court has before it plaintiff's Complaint, Application for Injunction Staying Proceeding in Iowa District Court, and Application to Proceed in Forma Pauperis.[1] This Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(a)(3). A hearing was held on November 7, at which both parties argued the issue whether it would be legally proper for this Court to stay the November 8 state court criminal trial of plaintiff.

Billy Junior Allen was scheduled to go to trial in the Iowa District Court in and for Polk County on a first-degree burglary charge on November 8, 1983. The first-degree burglary charge arose from the same incident that had led to plaintiff's trial and acquittal on first-degree felony murder charges in November 1982. On September 16, 1983, plaintiff filed a motion to dismiss the first-degree burglary charge, contending that his trial on that charge would violate the Fifth and Fourteenth Amendments to the United States Constitution by placing him in

jeopardy twice for the same offense. The Iowa District Court in and for Polk County, reaching the merits of plaintiff's double jeopardy contention, denied the motion on November 3.

Plaintiff then attempted to obtain review in the Iowa Supreme Court by first filing an application for discretionary review on November 3 pursuant to Iowa Code § 814.6(2)(1983). On November 4 the Iowa Supreme Court denied the application for discretionary review. Next, plaintiff filed a notice of appeal on November 7 pursuant to Iowa Code § 814.6(1)(a) (1983).[2] The Iowa Supreme Court, speaking through Chief Justice W. W. Reynoldson, dismissed the notice of appeal without prejudice to plaintiff's right to reassert the double jeopardy contention on direct appeal in the event of an adverse trial court judgment.

This action was then commenced late in the afternoon of November 7 by plaintiff's filing in this Court (1) a complaint alleging a violation of 42 U.S.C. § 1983, and (2) an application for injunction to stay the impending state court proceedings. Before plaintiff's trial commenced, this Court entered an Order granting plaintiff a temporary stay of the state court proceedings, stating that this written opinion supporting the Order would be subsequently filed.

Plaintiff alleges the state prosecutor chose to submit first-degree robbery as the felony-predicate underlying the felony-murder charge of which he was acquitted in November 1982. On the facts of his alleged offense, plaintiff asserts the

state prosecutor could have submitted first-degree burglary as the felony-predicate. Thus, plaintiff contends first-degree burglary should be determined to have been an offense included in the felony-murder charge.

"A federal lawsuit to stop a prosecution in a state court is a serious matter." Younger v. Harris, 401 U.S. 37, 42 (1971). In Younger, the United States Supreme Court re-examined the principles governing federal judicial intervention in pending state prosecutions and reaffirmed a policy of equitable restraint in such matters. The equitable restraint policy explained in Younger and its progeny is founded on "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Id. at 43-44. The Younger Court found that the equitable restraint policy is reinforced by principles of federalism in circumstances in which a federal court is asked to interfere with a pending state prosecution. Id. at 44. Thus, the Court held that, unless a party can show "bad faith" and "harassment" by state prosecutors or other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment," a federal court must not enjoin a pending state prosecution. Id. at 53-54.

The Iowa District Court in and for Polk County found

against plaintiff on his claim of harassment and that claim is not raised in this action. Thus, absent a showing of extraordinary circumstances, this Court could not have stayed plaintiff's second trial.

The United States Supreme Court has refined the meaning of extraordinary circumstances warranting federal equitable relief against pending state prosecutions. In Kugler v. Helfant, 421 U.S. 117 (1975), the Court emphasized that extraordinary circumstances "must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." Id. at 125. The Kugler Court also noted that it was impossible to foresee and clearly define the circumstances that would create a threat of great, immediate, and irreparable injury, warranting federal equitable intervention. Id. at 124-25

The Court determines that extraordinary circumstances exist in this case because the constitutional right not to be tried twice for the same offense, which plaintiff seeks to vindicate, could be lost if plaintiff were required to go to trial, and await final judgment and sentencing, before he would be entitled to appellate review of the denial of his motion to dismiss.[3] Furthermore, plaintiff has exhausted all available state procedures for asserting his double jeopardy contention through which he could avoid the second trial. Abney v. United States, 431 U.S. 651 (1977), offers strong support for the

the issuance of a temporary stay.

In Abney the issue before the United States Supreme Court was whether a denial of a motion to dismiss a federal indictment on double jeopardy grounds constituted a "final decision," as that term is used at 28 U.S.C. § 1291. In deciding that the denial of the motion to dismiss was a final decision, although not a final judgment, the Court stated:

> In the first place there can be no doubt that such orders constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee....
>
> Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. The elements of that claim are completely independent of his guilt or innocense. Indeed, we explicitly recognized that fact in Harris v. Washington, 404 U.S. 55 (1971), where we held that a State Supreme Court's rejection of an accused's pretrial plea of former jeopardy constituted a "final" order for purposes of our appellate jurisdiction under 28 U.S.C. § 1257.

Id. at 659-60 (note and citctions omitted).

Although the Iowa Supreme Court has not finally rejected plaintiff's double jeopardy defense, it has refused to consider the matter on its merits until after final judgment

and sentencing, in accordance with the Iowa law for appeal as of right. Iowa Code § 814.6(1)(a)(1983)(set forth at footnote 2). Under the Iowa court's ruling, plaintiff would have no opportunity to obtain appellate review of his double jeopardy contention until after he stood trial for a second time. In Abney, the United States' Supreme Court found such review to be inadequate to protect constitutional interests.

> [T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.
>
> ....
>
> Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction.

Id. at 660-61 (note and citations omitted). As these interests would not be protected if plaintiff cannot obtain appellate review until after trial, judgment, and sentencing, the Court determines plaintiff would be irreparably injured were a stay not granted.

For these reasons, this Court is convinced that extraordinary circumstances exist when a party cannot obtain appellate review of a denial of a motion to dismiss criminal charges on double jeopardy grounds, before the commencement of the impending second trial.

Plaintiff contends that the present posture of the state criminal proceeding is such that he is entitled to appeal directly to the United States Supreme Court pursuant to 28 U.S.C. § 1257. There is support for plaintiff's position. Bullington v. Missouri, 451 U.S. 430, 437 n.8 (1981); Harris v. Washington, 404 U.S. 55, 56 (1971); see Abney v. United States, 431 U.S. 651, 662 (1977).

It is also more appropriate for the Supreme Court of the United States to consider, on direct appeal from the Iowa Supreme Court's ruling, the constitutional issue involved than it is for this Court to determine the issues in this collateral action.

This Court believes that the appropriate equitable and injunctive relief is to stay temporarily the state court criminal trial to give plaintiff the opportunity to present the issue to the United States Supreme Court. Until the United States Supreme Court has responded to plaintiff's appeal, further action in this Court should also be stayed.

Therefore, as stated in the Order of this Court dated November 8, 1983,

IT IS THEREFORE ORDERED that the trial of Billy Junior Allen in the District Court of Iowa in and for Polk County should be and it hereby is stayed for a period of thirty days from the date of November 8, 1983.

IT IS FURTHER ORDERED that proceedings in this Court will also be stayed until further order of the Court.

Signed this 10 day of November, 1983.

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA.

[1]The information given by plaintiff to support his request to proceed in forma pauperis shows he has no property, savings, or income. Based on the information, the Court concludes that petitioner should be granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).

[2]Iowa Code § 814.6(1)(a) (1983) provides:

> 1. Right of appeal is granted the defendant from:
>
> a. A final judgment of sentence, except in case of simple misdemeanor and ordinance violation convictions.

[3]The Court also notes that, because plaintiff seeks injunctive relief as part of an action brought under 42 U.S.C. § 1983, 28 U.S.C. § 2283 does not bar the issuance of a temporary stay. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972).

ORIGINAL

No. 83-5908

RECEIVED
DEC 12 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Billy Junior Allen,

Appellant

v.

State of Iowa,

Appellee

MOTION TO LEAVE TO PROCEED IN FORMA PAUPERIS

The appellant, Billy Junior Allen, respectfully moves the Court for leave to proceed herein in forma pauperis. Appellant has previously been granted leave to so proceed in the U.S. District Court. The affidavit of the appellant in support of this motion is hereto attached.

Presented herewith is a Notice of Appeal of the moving party.

Dated December 7, 1983.

Respectfully submitted,

Rick L. Olson
Suite 1000 Carriers Building
601 Locust
Des Moines, IA 50309
Telephone: (515) 243-1979
ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BILLY JUNIOR ALLEN,

Appellant

v.

STATE OF IOWA,

Appellee

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Billy Junior Allen, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this court are true.

1. Are you presently employed? No.

   a. Date last employed: 12/81 Wages per month: $640

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources? No

3. Do you own any cash or checking or savings account? No

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing?) No

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Billy Junior Allen

Subscribed and Sworn to Before
me this 6 day of January, 1983.

NOTARY PUBLIC IN AND FOR THE
STATE OF IOWA

83-5908

IN THE SUPREME COURT OF IOWA

No. 83-1432

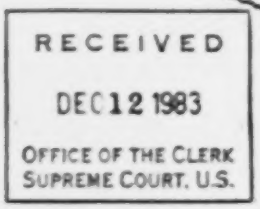
STATE OF IOWA,

Appellee

v.

BILLY JUNIOR ALLEN,

Appellant



NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that, Billy Junior Allen, the appellant above-named, hereby appeals to the Supreme Court of the United States from the order of the Iowa Supreme Court, through Chief Justice W.W. Reynoldson, entered on November 7, 1983 dismissing without prejudice the appellant's appeal. Appellant had appealed as a matter of right a pretrial order denying his motion to dismiss his pending first-degree burglary charge on double jeopardy grounds.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, Subparagraph (2).

Dated this 7th day of December, 1983.

Rick L. Olson
1000 Carriers Building
601 Locust
Des Moines, IA 50309
Attorney for Appellant

Supreme Court, U.S.
FILED
JAN 13 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-5908

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BILLIE JUNIOR ALLEN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

MOTION TO DISMISS

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General

RICHARD L. CLELAND
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ATTORNEYS FOR THE APPELLEE
STATE OF IOWA

January 11, 1983

*Counsel of Record

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NO. 83-5908

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BILLIE JUNIOR ALLEN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

MOTION TO DISMISS

COMES NOW the named Appellee, the State of Iowa, through counsel and hereby moves to dismiss the appeal of Billie Junior Allen pursuant to United States Supreme Court Rules 16.1(a) and 16.1(b) and in support thereof states that:

1. Appellant stands charged with burglary in the first degree in violation of Iowa Code §§ 713.1 and 713.3 by trial information filed December 2, 1982.

2. On September 16, 1983, Appellant filed a Motion to Dismiss alleging, inter

alia, that prosecution of Appellant violated the Double Jeopardy Clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment.

3. Appellant's motion was heard in the Iowa District Court in and for Polk County on September 28, 1983, and on November 3, 1983, a ruling was issued denying Appellant's motion.

4. Appellant filed a notice and application for discretionary review in the Iowa Supreme Court on November 3, 1983. Appellant's application was denied on November 4, 1983.

5. On November 4, 1983, Appellant filed a notice of appeal in the Polk County District Court. The State moved the Iowa Supreme Court to dismiss Appellant's appeal on November 7, 1983, for lack of jurisdiction. The appeal was dismissed the same date.

6. On November 7, 1983, Appellant filed an action under 42 U.S.C. § 1983 in the

Federal District Court for the Southern District of Iowa and sought a stay of the state criminal proceedings. That court, the Honorable W. C. Stuart presiding, ordered a stay of the state criminal proceedings for 30 days to allow Appellant to file an appeal in this Court.

7. Appellant filed a notice of appeal on December 7, 1983 pursuant to 28 U.S.C. § 1257(2) appealing the order of Chief Justice W. W. Reynoldson, dismissing without prejudice Appellant's appeal to the Iowa Supreme Court. A jurisdictional statement was filed on December 12, 1983.

8. A right to appeal is provided under 28 U.S.C. § 1257(2) from "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity."

9. This appeal is not within this Court's jurisdiction under 28 U.S.C. § 1257(2) for the following reasons:

a. The order of Chief Justice W. W. Reynoldson does not constitute a final judgment or decree of the highest court of the State of Iowa in which a decision could be had on the issue of whether the instant prosecution violates double jeopardy. Appellant's appeal runs to the wrong court. An appeal on that issue must run to the Iowa District Court in and for Polk County since, as Appellant concedes, Appellant's appeal in the Iowa Supreme Court was not dismissed on its merits. Norfolk & S. Turnpike Co. v. Virginia, 225 U.S. 264, 269 (1912); Western Union Telegraph Co. v. Hughes, 203 U.S. 505, 506-07 (1906).

b. The ruling of the Iowa District Court in and for Polk County denying Appellant's motion to dismiss for violation of double jeopardy does not constitute a ruling in favor of the constitutional validity of a state statute and thus no jurisdiction attaches to that ruling under 28 U.S.C. § 1257(2).

c. The order of Chief Justice W. W. Reynoldson dismissing Appellant's direct appeal to the Iowa Supreme Court does not constitute a ruling in favor of the constitutional validity of Iowa Code § 814.6(1) (1983) because there is no record that the constitutional validity of section 814.6(1) was presented to or ruled on by the Iowa Supreme Court. Webb v. Webb, 451 U.S. 493, 498-501 (1981); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

10. This appeal does not present this Court with a substantial federal question and should be dismissed.

a. Appellant has no constitutional right to appeal. Abney v. United States, 431 U.S. 651, 656 (1977). State law provides that a defendant can raise the question of double jeopardy prior to trial in the district court and, in the event that a defendant is unsuccessful there, an application for discretionary review may be made to the Iowa Supreme Court. The constitution does not require more.

b. The Double Jeopardy Clause does not bar the successive prosecution of the Appellant for first degree burglary following an acquittal of first degree felony murder based on robbery because each offense requires proof of an

additional fact that the other does not. Illinois v. Vitale, 447 U.S. 410, 416 (1980).

c. Appellant's disagreement with the Iowa District Court over application of this Court's decision Ashe v. Swenson, 397 U.S. 436 (1970), does not constitute a substantial federal question; in addition, the doctrine of collateral estoppel does not bar successive prosecution of separate offenses that arise from the same facts except where the prosecutions contain an identical issue of ultimate fact that is finally decided in the first prosecution. Id. at 443. As the district court correctly found after a complete examination of the prior proceedings, the instant prosecution for first degree burglary does not raise an issue necessarily decided

in the initial prosecution for felony murder.

WHEREFORE, the State of Iowa respectfully requests that this appeal be dismissed.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General

RICHARD L. CLELAND
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Hoover Building
State Capitol
Des Moines, Iowa 50319
(515) 281-5166

ATTORNEYS FOR APPELLEE

*Counsel of Record

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5908

BILLIE JUNIOR ALLEN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS

In this action, Appellant, Billie Junior Allen, seeks to appeal an order of Chief Justice W. W. Reynoldson of the Iowa Supreme Court dismissing Appellant's appeal to the Iowa Supreme Court. For the reasons stated below, this appeal should be dismissed.

STATEMENT OF THE CASE

Appellant has been charged with burglary in the first degree in that on or about March 5, 1982, Appellant committed burglary in the

first degree upon the property of Clifford Welling and intentionally or recklessly inflicted physical injury upon Clifford Welling. (Appellant's App. D, p. 3.)

Appellant had been previously charged with murder in the first degree in that he did commit or aid and abet in the commission of murder in the first degree resulting in the death of Clifford Welling. (Appellant's App. D, p. 3.) Burglary was not submitted to the jury either as a lesser included offense or as a felony under felony murder in the prosecution for felony murder. (Appellant's App. D, p. 3.) The trial court submitted murder in the first degree with no aiding and abetting instruction. (Appellant's App. D, p. 19.) The case was tried and instructed on the theory that the Appellant was the one who actually stabbed and killed the victim. (Appellant's App. D, p. 19.) An instruction concerning felony murder was given, with robbery as the underlying felony.

(Appellant's App. D, p. 19.) Appellant was acquitted of the murder charge.

On September 16, 1983, Appellant filed a motion to dismiss on the ground, inter alia, that Appellant was being placed twice in jeopardy in violation of the Fifth and Fourteenth Amendments and that the Appellant's prosecution for burglary was precluded under the theory of collateral estoppel/issue preclusion. Appellant's motion was overruled. The district court rejected Appellant's double jeopardy claim because both felony murder based on robbery and burglary in the first degree require proof that the other does not require. (Appellant's App. D, pp. 11-13.) Appellant's collateral estoppel/issue preclusion claim was rejected on the ground that the instant prosecution did not involve any issue of ultimate fact litigated in the murder prosecution.

Appellant filed an application for discretionary review in the Iowa Supreme

Court on November 3, 1983. This application was denied on November 4, 1983.

Appellant filed a notice of appeal in the Iowa Supreme Court on November 4, 1983. Appellant's Memorandum Brief Supporting Notice of Appeal alleged only that the district court's ruling was a "final judgment" under Iowa Code § 814.6 (1983). On November 7, 1983, Appellant's appeal was dismissed without prejudice to raise the same issues in the event of a conviction.

Notice of appeal to this Court from the order of Chief Justice Reynoldson dismissing Appellant's appeal was filed in the Iowa Supreme Court on December 7, 1983. Appellant relies on 28 U.S.C. 1257(2).

SUMMARY OF ARGUMENT

Appellee presents two arguments. First, this Court lacks jurisdiction of this appeal. The order dismissing Appellant's appeal in the Iowa Supreme Court is not a final judgment by the highest court of the State in which a decision could be had on Appellant's

double jeopardy claim. Appellant's double jeopardy claim does not concern the constitutional validity of a state statute, and the constitutional validity of Iowa Code § 814.6(1) is not before this Court.

Second, the issues raised do not present substantial federal questions for determination. Iowa Code § 814.6(1) does not violate Appellant's constitutional right to an appeal because Appellant has no such right. Moreover, the pending prosecution for burglary in the first degree does not violate Appellant's right not to be placed twice in jeopardy for the same offense. Felony murder based on robbery and burglary each require an element not required for the other, and the instant prosecution does not concern an essential fact necessarily decided in Appellant's previous trial.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

1. The order of the Iowa Supreme Court dismissing Appellant's appeal is not an order by the highest court of the state in which a decision could be had on the issue of double jeopardy.

It is jurisdictional that an appeal run to the proper court. In Western Union Telegraph Co. v. Hughes, 203 U.S. 505 (1906), this Court, in considering whether it had jurisdiction of writ of error from the supreme court of appeals of Virginia, said:

> Treating the order of dismissal as a final judgment, we are now asked on this writ of error to reverse the ruling of the supreme court of appeals of Virginia. This, however, we cannot do. It is immaterial that the supreme court of appeals was vested by the state Constitution with appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the Constitution of Virginia or of the United States, or that, in the opinion delivered by the court, it discussed the Federal question and declared it to be without merit. The fact is undoubted that the writ of error was dismissed solely and expressly because of a want of jurisdiction, and the effect of the formal entry, adjudging that the court was without jurisdiction to

> pass upon the questions presented by the writ of error, cannot be different from what it would have been had the court not given expression to its views in a written opinion. The necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court where the questions presented by the writ could be decided; and hence, the writ of error should have been directed to that court.

Id. at 506-07 (emphasis added). This position was reaffirmed in Norfolk & S. Turnpike Co. v. Virginia, 226 U.S. 264 (1912):

> [W]e now state that from and after the opening of the next term of this court, when a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo Case [dismissing for want of jurisdiction], and shall therefore, by not departing from the face of the record, solve against

> jurisdiction the ambiguity created by the form in which the state court has expressed its action.

Id. at 269.

There is no dispute in the instant case. Appellant's appeal to the Iowa Supreme Court was dismissed for lack of jurisdiction. Appellant admits as much on pages 1 and 4 of his jurisdictional statement. Moreover, it is clear that Justice Reynoldson did not rule on the merits of Appellant's double jeopardy claim since the appeal was dismissed without prejudice to raise the issue on appeal in the event that defendant was convicted. Thus, the Iowa District Court in and for Polk County is the highest court of Iowa in which a decision could be had on the issue of whether the instant prosecution violates double jeopardy and this appeal must be dismissed for want of jurisdiction.

2. The ruling of the Iowa District Court in and for Polk County denying Appellant's motion to dismiss for violation of double jeopardy does not constitute a ruling in favor of the validity of a state statute.

As applicable here, section 1257(2) limits appeal to those cases where a state statute has been challenged on the ground that it violates the federal constitution and has been found valid by a state court. Appellant's double jeopardy claim does not qualify to give this Court jurisdiction under section 1257(2), and this appeal should be dismissed.

3. There is no record that the state court was ever presented with or ruled on Appellant's constitutional challenge to Iowa Code § 814.6(1) (1983).

Appellant claims that Iowa Code § 814.6(1) is unconstitutional because it does not allow as a matter of right a defendant to obtain appellate review of an alleged double jeopardy claim prior to trial. There is no record that this issue was ever presented to the Iowa Supreme Court.

This Court has determined that it will not decide federal constitutional issues raised before it for the first time on review

of state court decisions. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). "At a minimum, however, there should be no doubt from the record that a claim under . . . . the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim. . . ." Webb v. Webb, 451 U.S. 493, 501 (1981).

Appellant's Memorandum Brief Supporting Notice of Appeal alleged only that the district court's ruling was a "final judgment" under Iowa Code § 814.6 (1983). There is no record that Appellant raised the constitutional issue below that he now seeks to raise in this Court, and thus, this appeal should be dismissed.

II. THIS APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.[1]

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[1] In addition to the argument presented in I(1) above, the following reasons also apply to exercise of certiorari jurisdiction should the Court treat this appeal as a petition for writ of certiorari.

1. Iowa Code § 814.6 (1983) is not unconstitutional.

Appellant asserts that because he does not have an appeal of right under Iowa Code § 814.6 (1983) before trial on double jeopardy that that section is unconstitutional. This issue does not raise a substantial federal question.

Appellant has no constitutional right to appeal. Abney v. United States, 431 U.S. 651, 656 (Iowa 1977). How, then, can there be a constitutional right to appeal a particular issue at a particular time? "The right to appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute. . . ." Id.

Appellant's reliance on Abney and Harris v. Washington, 404 U.S. 55, 56 (1971) is misplaced. Those cases resolved questions of statutory construction concerning 28 U.S.C. § 1291 and 28 U.S.C. § 1257 respectively, not questions of constitutional law.

Finally, under state law a defendant can litigate a question of double jeopardy in the district court before trial. Appellant availed himself of that opportunity here. If a defendant is dissatisfied with the decision of the district court, he can seek discretionary review in the Iowa Supreme Court. Appellant availed himself that opportunity also. If discretionary review is denied, a defendant can challenge the district court ruling on appeal if trial results in an adverse verdict. The constitution does not require more.

2. The Double Jeopardy Clause does not bar prosecution of the Appellant for first degree burglary.

In Illinois v. Vitale, 447 U.S. 410 (1980), defendant was charged and convicted with failing to reduce speed to avoid an accident after his automobile struck and killed two children. Defendant was also charged with involuntary manslaughter based on the same incident. The Illinois Supreme

Court ruled that the manslaughter prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment.

This Court reversed stating, "the principal test for determining whether two offenses are the same for purposes of barring successive prosecutions . . . 'is whether each provision requires proof of a fact which the other does not.'" Id. at 416 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). This "test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." Vitale at 416.

It is clear that felony murder based on robbery and burglary each require proof of an element not required for the other offense. Felony murder requires proof of a killing. Iowa Code §§ 707.1 and 707.2 (1983). Burglary requires proof of either a breaking, entering, or remaining on premises without permission. Iowa Code §§ 713.1 and 713.3

(1983). Thus, double jeopardy does not bar Appellant's prosecution for burglary in the first degree.

3. Collateral estoppel/issue preclusion does not bar Appellant's prosecution for burglary in the first degree.

In Ashe v. Swenson, 397 U.S. 436, 442-43 (1970), this Court held that the concept of collateral estoppel was included in the guarantee against double jeopardy. Collateral estoppel as applied here means "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. In applying the test where a previous judgment of acquittal was based upon a general verdict, the court must "'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the

defendant seeks to foreclose from consideration.'" Id. at 444.

The instructions in the murder prosecution required that the jury find that Appellant stabbed Clifford Welling. No aiding and abetting theory was submitted to the jury. (Appellant's App. D, p. 26.) Thus, unlike Turner v. Arkansas, 407 U.S. 366 (1972), a general verdict of acquittal does not necessarily mean that the jury that considered Appellant's guilt for felony murder found that Appellant was not present at the scene of the crime. As the district court found:

> Further, as shown in this Court's finding of fact, there is overwhelming evidence in the record of the murder prosecution that this Defendant was present at the scene. A reasonable explanation for the verdict is that the jury believed Defendant was present but either Jimmy Allen or Reimers stabbed the victim. The jury might have disbelieved Reimers' denial and believed Ratigon's claim that Reimers told him he killed the victim.

(Appellant's App. D, p. 27.) Thus, the instant prosecution for burglary in the first degree does not involve an issue that was necessarily determined in the previous prosecution. If the jury determined that Reimers stabbed the victim, it did not need to reach the issue of Appellant's presence.

CONCLUSION

For all the above reasons, this appeal should be dismissed.

Respectfully submitted,

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